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Nos. 78-1567, 78-1568, 78-1569 and 78-1570

In the Supreme Court of the United States

OCTOBER TERM, 1978

ROBERT D. HOLLEMAN, PETITIONER

v.

UNITED STATES OF AMERICA

WILLIAM R. WINDERS, PETITIONER

v.

UNITED STATES OF AMERICA

WILLIAM W. EDWARDS, PETITIONER

v.

UNITED STATES OF AMERICA

JOHN B. HARRIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Winders Pet. App. A) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 1979. Petitions for rehearing were denied on March 14, 1979. The petitions for a writ of certiorari were filed on April 13, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the trial court correctly instructed the jury on the elements of the offense of misapplication

of the funds of a savings and loan association, 18 U.S.C. 657.

2. Whether the evidence was sufficient to support the convictions of petitioners Holleman and Winders.

3. Whether the trial court erred in denying motions to sever made by petitioners Holleman and Winders.

4. Whether the voir dire questioning of the jury panel was proper.

5. Whether the government's bringing of subsequent charges against petitioner Harris was improper.

STATEMENT

Following a jury trial in the United States District Court for the Middle District of North Carolina, petitioners Edwards and Harris were convicted on 13 counts of misapplying the funds of a federally insured savings and loan association, in violation of 18 U.S.C. 657; three counts of making false entries in the records of that association, in violation of 18 U.S.C. 1006; and one count of conspiracy, in violation of 18 U.S.C. 371. Petitioner Holleman was convicted on one count of conspiracy and four counts of misapplication of funds, and petitioner Winders was convicted on one count of conspiracy and three counts of misapplication of funds (Winders Pet. App. A-3 to A-4).[1]

Petitioners Edwards and Harris were each sentenced to five years' imprisonment and a fine of

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[1] Petitioners Holleman and Winders were each acquitted on one count of misapplication of funds.

$58,000 (A. 106, 108).[2] Petitioner Holleman was sentenced to three years' imprisonment and a fine of $26,000 (A. 109). Petitioner Winders was sentenced to three years' imprisonment and a fine of $22,000 (A. 110).[3] The court of appeals affirmed the convictions of all four petitioners (Winders Pet. App. A).

The evidence at trial showed that petitioners were involved in a scheme whereby co-defendant Bobby Roberts, a real estate developer, secured money from the First Federal Savings and Loan Association of Durham, North Carolina, through sham loan transactions. Petitioner Edwards was the president and a director of the loan association. Petitioner Harris was the secretary-treasurer and also a director of the association. Petitioners Holleman and Winders were attorneys involved in several of the loan transactions.

During the period in which the scheme was in operation, First Federal had outstanding loans to Bobby Roberts in an amount approaching the association's lending limit to any one party (Tr. 2015-2016, 2152). In order to obtain funds, therefore, Roberts applied for loans in 13 separate transactions using various friends, relatives, associates, and employees as the named borrowers (Tr. 768, 859, 874,

[2] "A." refers to the Joint Appendix of Appellants in the court of appeals.

[3] Co-defendant Bobby Roberts was convicted on one count of conspiracy and 13 counts of misapplication of funds. He was sentenced to five years' imprisonment and a fine of $49,000 (A. 107).

1349, 1493-1495, 1780-1783). Petitioners Harris and Edwards approved and arranged for these loans in a manner that violated numerous established bank procedures (Tr. 770-809). Often, the loans were for amounts far greater than the appraised value of the underlying security (Tr. 828, 2280-2282, 2292-2294). The named borrowers received no benefit from the loans and did not expect to have to repay them; in five out of seven cases the named borrower was financially unable to repay the loan (Tr. 874-878, 891, 1360-1366, 1432-1433, 1751, 1762, 1781-1784). The proceeds of several of the loans were distributed through checks made out to "Holleman, Trustee" or "Winders, Trustee"—a procedure used by the bank only in the case of the Roberts loans—and the money was thereafter given to Roberts by Holleman or Winders (Tr. 528, 615-616, 757-758, 777-778, 837, 2258-2267).

ARGUMENT

1. Petitioners contend (Holleman Pet. 10-13; Edwards Pet. 5-19; Harris Pet 8-23) that the trial court failed properly to instruct the jury as to the elements of the offense of misapplication of funds under 18 U.S.C. 657. They claim that as a result of the court's instructions, the jury may have convicted them for nothing more than a violation of the association's technical regulations. A conviction based on such a construction of the statute, they contend, would be contrary to the decision of this Court in *United*

States v. *Britton*, 107 U.S. 655 (1882). This contention is not supported by the record.

The trial court gave extensive instructions regarding the intent required to support a conviction under Section 657 (Tr. 2729-2735). Specifically, the court instructed (*id.* at 2729, 2731-2732):

> The fourth essential element is that in each of these counts that each of the defendants acted knowingly and willfully with intent to injure and defraud the savings and loan association.
>
> * * * * *
>
> However, the term "willfully misapply" means a criminal misapplication rather than a mere act of maladministration or a mere exercise of bad judgment, or in the misuse of the association's monies, funds, and credits. In order for there to be a willful misapplication, the defendants must convert the association's monies, funds or credits to the use, benefit, or gain of one or more of the defendants or to some other person's or company's use, benefit, or gain.
>
> In addition to such an unauthorized or unlawful appropriat[ion] of the association's monies, funds, credits, assets, or securities, the act must have been done knowingly and willfully with the specific intent to injure or defraud the association.[4]

[4] The portion of the instruction quoted by petitioners Harris and Edwards (Harris Pet. 12-13; Edwards Pet. 9-10) was given in the context of an attempt by the court to define the effect of any consent or authorization by the board of directors (Tr. 2732-2733) and was not a direct instruction on intent.

The court therefore made it clear that mere bad judgment would not sustain a conviction under this statute. Nor could petitioners be convicted, under the instruction given by the court, merely on a finding that they made loans to the named borrower knowing the proceeds would be turned over to someone else, as in *United States* v. *Gens*, 493 F.2d 216 (1st Cir. 1974), and *United States* v. *Gallagher*, 576 F.2d 1028 (3d Cir. 1978), cited by petitioners. Instead, the court expressly stated that a specific intent to injure or defraud the loan association was necessary in order to support a conviction. The instruction fully met the standard set out in *United States* v. *Britton*, *supra*, 107 U.S. at 668-669. Because the court properly instructed the jury on the intent element, it was under no further requirement to use the language suggested by petitioners. *See United States* v. *Southers*, 583 F.2d 1302, 1306-1307 (5th Cir. 1978); *United States* v. *Dreitzler*, 577 F.2d 539, 549 (9th Cir. 1978).

2. Petitioners Holleman and Winders contend (Holleman Pet. 13-16; Winders Pet. 12-20) that the evidence was insufficient to support their convictions. This claim is insubstantial.

Both petitioners were convicted on the conspiracy count and as aiders and abettors on several substantive counts.[5] As the court of appeals concluded

[5] Petitioner Holleman to the contrary notwithstanding (Pet. 20-23), it is permissible to convict a defendant as an aider and abettor even though he was charged as a principal. *United States* v. *Longoria*, 569 F.2d 422 (5th Cir. 1978);

(Winders Pet. App. A-5), there was ample evidence from which the jury could have concluded that the attorneys "were willing and knowing conduits of the funds which were passed along to Roberts, and participated in the concealment of the transactions in the records of the Association."

The evidence showed that on several occasions the proceeds from the loans were delivered in checks made out to "Winders, Trustee" or "Holleman, Trustee," an unusual procedure employed by the bank only with these straw loans. Petitioners Winders and Holleman would then deliver the proceeds to Bobby Roberts rather than to the named borrower (Tr. 615-616, 757-758, 777-778, 837, 2258-2267). On several occasions bank officials, after receiving the loan application, asked Holleman or Winders to conduct a title search. The certificates were then prepared with such unusual speed as to indicate that the attorneys had prior knowledge of the intended transaction (Tr. 806, 1307-1308). Petitioner Winders was found to have submitted an inaccurate title certificate in connection with the first of these straw loans, and petitioner Holleman did the same in connection with one of the later loans (Tr. 622-626, 1317-1318, 2264-2265, 2292-2298). Petitioner Holleman failed to submit chain of title information as required by the bank on two of the loans; the effect of this failure was to conceal Bobby Roberts' interest in the property (Exhs. 8, 9, 12; Tr. 1285-1286). Finally, a check for $1,500, promised to one of the named borrowers as payment for the use of his name, was mailed from petitioner Holleman's office (Tr. 1784). This loan was made and the check mailed after the bank's board of directors, at a meeting attended by Holleman, had voted not to extend any additional loans to Bobby Roberts or any persons with related interests (Tr. 1550-1552). Accordingly, the evidence was sufficient to support the jury's conclusion that petitioners had intentionally participated in the fraudulent schemes.[6]

3. Petitioners Holleman and Winders contend (Holleman Pet. 16-19; Winders Pet. 9-12) that the court erred in denying their motions for severance. This is an essentially factual question and thus one not appropriate for certiorari. In any event, the evidence shows that the trial court acted well within its discretion in denying these motions. Of 18 counts, petitioner Holleman was charged in six and was involved in the transaction that was the subject of a seventh count. Additionally, two of the false entry

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United States v. *Thomas*, 469 F.2d 145 (8th Cir. 1972), cert. denied, 410 U.S. 957 (1973). See *Nye & Nissen* v. *United States*, 336 U.S. 613 (1949). *Stirone* v. *United States*, 361 U.S. 212 (1960), cited by petitioner, involved the possibility that the defendant was convicted of an offense completely different from that charged by the grand jury and is therefore inapposite to the instant case.

[6] Petitioner Winders' claim (Pet. 16-20) that the money belonged to the borrower and not to the bank at the time he handled it is frivolous. The evidence establishes his involvement in the conspiracy and his willful participation as an aider and abettor in the substantive offenses. The point at which he actually touched the money is irrelevant.

counts related to transactions in which he had participated. Petitioner Winders was charged in five counts, and one of the false entry counts related to the charges against him. Moreover, both petitioners were charged with conspiracy. Testimony as to the other offenses that was relevant to prove the conspiracy would therefore have been admissible against each of them even if their cases had been severed. *Lutwak* v. *United States*, 344 U.S. 604 (1953). Neither petitioner identified particular pieces of evidence especially damaging to him that the jury could not have heard had his trial been severed.

Petitioner Holleman argues that the joint trial denied him the right to call his co-defendants as witnesses. He makes no concrete showing of the testimony that his co-defendants would have given in his behalf and cites no cases indicating that his circumstances and the showing he made would entitle him to a severance on this ground. In fact, absent a specific showing that such witnesses have unconditionally offered to testify, a court does not abuse its discretion in denying a severance request in such cases. *United States* v. *Becker*, 585 F.2d 703, 706 (4th Cir. 1978); *United States* v. *Gay*, 567 F.2d 916 (9th Cir.), cert. denied, 435 U.S. 999 (1978).

Finally, the extent of petitioners' participation in the unlawful scheme serves to distinguish this case from *United States* v. *Mardian*, 546 F.2d 973 (D.C. Cir. 1976), and *United States* v. *Kelly*, 349 F.2d 720 (2d Cir. 1965), relied on by petitioners. In those

cases, the role played by the defendant in the overall scheme was deemed to be so minimal that the joint trial clearly resulted in prejudice to the defendant. Here, by contrast, petitioners Holleman and Winders played significant roles in the scheme, and there is no showing that they were prejudiced by "spill-over" evidence relating solely to more culpable defendants. Indeed, the jury demonstrated its ability to distinguish between separate offenses by acquitting each of these two petitioners on one count of misapplication of funds (page 3, *supra*).

4. Petitioners next argue (Holleman Pet. 24-27; Edwards Pet. 20-24; Harris Pet. 23-27) that the voir dire questioning of the jury panel was conducted improperly and that pretrial publicity had prejudiced their case.

The trial was held in Durham, North Carolina, at petitioners' request. Of the 12 impaneled jurors and the two alternates, none knew any of the facts of the case, and only two had heard or seen anything about the case. One of the jurors had heard of the case on the radio, and another had read of the upcoming trial in the newspaper, but the court's inquiry established that neither had any knowledge of the facts and that neither had formed any opinion as to the guilt or innocence of the defendants (Tr. 32, 122).

The record shows that the jurors were adequately questioned by the trial court in order to ascertain if there was any prejudice against petitioners as a result of the publicity. Although the questioning was done with all the jurors present, the court is not

required to proceed otherwise unless it finds a likelihood of substantial prejudice. *United States* v. *Jones*, 542 F.2d 186, 194-195 (4th Cir.), cert. denied, 426 U.S. 922 (1976). The individualized procedure is used to prevent the other jurors from hearing prejudicial information. *United States* v. *Perrotta*, 553 F.2d 247 (1st Cir. 1977). In this case, although one of the prospective jurors expressed his inability to accord the defendants the presumption of innocence, he did so in highly general terms without revealing any prejudicial information to the other jurors (Tr. 95).[7] Petitioners have pointed to no other basis for their claim of prejudice, and they have therefore failed to establish that the trial court abused its discretion in conducting the voir dire examination as it did.

5. Petitioner Harris contends (Pet. 5-8) that the government behaved improperly with respect to charges that were brought against him following the filing of the indictment in this case. He claims that after he had entered a plea of not guilty to the charges in this case the government threatened to bring another charge against him. This threat was made, according to petitioner, in an effort to force him to plead guilty in this case. In addition, petitioner contends that the government improperly introduced the facts underlying the subsequent charge as a similar act in the trial of this case.

[7] That juror was excused for cause.

Petitioner's assertions of governmental impropriety are unfounded. The original indictment was handed down in September 1976. Subsequently, evidence of an additional, similar sham loan transaction was uncovered. The investigation of the additional unlawful loan was completed in early December and an indictment charging that violation was returned in January (S.A. 2).[8] There is nothing in the record to support the suggestion that the additional charge was brought in retaliation for petitioner's plea of not guilty. Instead, it was a legitimate charge brought subsequent to the original indictment only because the offense was discovered after the first indictment had been filed.[9] Accordingly, any reference to the later charge in subsequent plea negotiations would have been entirely proper. *Bordenkircher* v. *Hayes*, 434 U.S. 357 (1978).

Evidence of the additional loan transaction was admitted at petitioner's trial on the initial charges as a similar transaction showing knowledge and intent and as evidence of the conspiracy. Petitioner does not challenge the admissibility of this evidence, but he claims that it impaired his right to testify in his own behalf because he feared that his testimony would be used against him in a subsequent trial. The right to testify in one's own behalf, however, does not include the right to immunity from prosecution

[8] "S.A." refers to the Supplemental Appendix of Appellee in the court of appeals.

[9] The charge was not tried in this case.

for other crimes committed. Evidence of similar acts admitted under Rule 404(b) of the Federal Rules of Evidence often involves conduct that has been or could be subject to prosecution in its own right. The fact that the conduct is the subject of a pending indictment neither renders the evidence inadmissible nor constitutes improper conduct on the part of the government.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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